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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

vs. *Petitioner,*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LLOYD E. ELLIOTT,
Attorney for Petitioner.

O. D. BRUNDIDGE,
Of Counsel.

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of Haggar Company, a Texas corporation, would respectfully show to this Honorable Court:

I.

Summary Statement of the Case.

On August 22, 1933, petitioner filed its capital stock tax return pursuant to Section 215(d) and (f) of the National Industrial Recovery Act (48 Stat. 195, 208), giving as the

declared value of its capital stock, its par value of $120,000.00, petitioner assuming that the Act called for a declaration of such par value (R. 22).

On September 28, 1933, and within the extended time (Treasury Decisions Nos. 4368 and 4386) for filing capital stock tax returns for the year ending June 30, 1933, petitioner, in good faith, filed a second or amended capital stock tax return, declaring the actual value of its capital stock at $250,000.00 (R. 23).

On March 15, 1934, petitioner filed its income and excess-profits tax return for 1933, in which it inadvertently computed its excess-profits tax exemption at 12½% of $370,000.00 instead of $250,000.00 as it intended to do, and now claims should be done (R. 24).

Respondent, contending that the declared value in the return of August 22, 1933, should control, assessed a deficiency of $1376.52 excess-profits taxes against petitioner on March 3, 1937 (R. 26). An appeal to the Board of Tax Appeals (filed May 28, 1937, R. 2) being against petitioner (R. 11-15), it filed a petition for review in the United States Circuit Court of Appeals for the Fifth Circuit (R. 16-21), where the decision of the Board of Tax Appeals was affirmed on the ground that under Sec. 215(f) National Industrial Recovery Act, a capital stock tax return could not be amended within the time fixed for filing returns (R. 44-48).

II.

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495.

2. The decision of the Circuit Court of Appeals is in conflict with the decision of the Court of Claims in the case of *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, 394 C. C. H. par. 9528, decided May 29, 1939.

3. The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Honorable Court, in that there is now a recognized conflict between the Circuit Courts of Appeals on the question involved.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding that court to certify and send to this court for its review and determination, on a date certain therein to be named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 9009, Haggar Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, that said judgment of said court may be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

HAGGAR COMPANY,
By LLOYD E. ELLIOTT,
Dallas, Texas.

O. D. BRUNDIDGE.
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Board of Tax Appeals (R. 11-15) is reported in 38 B. T. A. 141. The opinion of the United States Circuit Court of Appeals (R. 44-48), is reported in 104 F. (2d) 24, as Haggar Company, petitioner vs. Commissioner of Internal Revenue, respondent. 394 C. C. H. par. 9523.

II.

Jurisdiction.

The date of the judgment to be reviewed is May 23, 1939 (R. 48).

Petitioner filed a motion for rehearing in the Circuit Court of Appeals (R. 49-50), which was overruled on June 17, 1939 (R. 51). Upon written application of petitioner (R. 51-52), the Circuit Court of Appeals ordered that the issuance of mandate be stayed thirty days from June 24, 1939 (R. 52).

2. The Honorable Circuit Court of Appeals affirmed the decision of the United States Board of Tax Appeals in favor of respondent upon the ground that Sec. 215(f) of the National Industrial Recovery Act did not permit a capital stock tax return once filed to be amended, even within the time fixed for the original filing of the return.

3. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A., Sec. 347, and Supreme Court Rule 38, Sec. 5(b).

4. Cases believed to support the jurisdiction of this court are:

Glenn v. *Oertel Co.* (C. C. A. 6), 97 F. (2d) 495;
Philadelphia Brewing Co. v. *United States* (Ct. Cl.), 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

III.

Statement of the Case.

The case has already been stated, pages 1 and 2 in the petition, which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

The Honorable Circuit Court of Appeals erred in holding that petitioner's capital stock tax return filed pursuant to

Sec. 215(f) of the National Industrial Recovery Act, on August 22, 1933, could not be, and was not, amended by the second return filed September 28, 1933, and within the extended time for filing capital stock tax return for the year ending June 30, 1933.

V.

Summary of the Argument.

The holding of the Circuit Court of Appeals that a capital stock tax return could not be amended within the time fixed for the original filing of the return is contrary to the holding of the Sixth Circuit Court of Appeals in the case of *Glenn* v. *Oertel Company*, 97 F. (2d) 495, and the holding of the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

Argument.

The decisions conflict on the construction to be given that portion of Sect. 215(f) of the National Industrial Recovery Act (copied in full in Appendix) reading:

> "For the first year ending June 30 in respect of which a tax is imposed by this Section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this Section."

In *Glenn* v. *Oertel Company*, 97 F. (2d) 495, the Circuit Court of Appeals for the Sixth Circuit in holding that, under the above statute, a return could be amended within the time allowed for filing the original return, said:

> "We cannot think that Congress intended an untrue return to be unamendable for no better or more sub-

stantial reason than that it was first in point of time, when the extension granted by the Commissioner had not expired when the correction was filed. Such construction logically followed permits the Government to lay a tax upon appellee's errors rather than its income. It goes further than that and destroys the 'primary object' of providing the excess profits tax in Sec. 216(a) which was to induce corporation to declare a fair and reasonable value upon their stock. See Senate Committee's Report No. 114 and the Conference Report No. 13185, p. 23. Surely no such harsh and far reaching results were intended. If they were, serious constitutional questions arise.

"We think that the correct view, which accords with the principle that 'in constructing tax laws all doubt must be decided in favor of the taxpayer' (Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211), is, that the incorrect, invalid return springing from an honest mistake would not support any fair levy or assessment and that the Congress did not intend to prohibit its correction within the permitted period; that 'the taxpayer should be permitted to do what he had the right to do in the first instance' (Lucas *v.* Sterling Oil & Gas Co., 6 Cir., 62 F. 2d 951, 952); and that the corrected return of September 1 be adjudged the 'first return under this section' as distinguished from returns of subsequent years which were to be based thereon. Emphasis should be laid upon the necessity of a correct return for the first year. This neither penalizes appellee nor takes away from appellant any substantial right. It places appellee upon an equal footing with all similar taxpayers who file a single corrected return within the permissible limit."

The Court of Claims reached a like result in *Philadelphia Brewing Company* v. *United States,* decided May 29, 1939, 27 Fed. Supp. 583, 394 C. C. H. ¶ 9528.

The Circuit Court of Appeals for the Fifth Circuit, in the instant case, held just to the contrary; and in referring to the above decision in *Glenn* v. *Oertel Company*, said:

> "We are not unmindful of a contrary holding by the Sixth Circuit in the case of Glenn *v.* Oertel Company, 97 F. (2) 495. In that case the opinion seems to take the view that the Congress was seeking to have the return declare the true or actual value of the capital assets of the corporation. Value is a relative term, and, when applied to the capital assets of a corporation, defies application of any set rule or formula for its determination. Since the assets include good will, franchises, value as a going concern, as well as physical properties with fluctuating values, a method of determination for one corporation may be unjust for another; and the value, once determined, is subject to change between the time of its determination and the filing date of the return. Thus, true or actual value is made irrelevant, and the corporation is given the privilege of making its own rules and applying its own formula, not for the determination of actual or real value, but for a basis upon which both taxes are to be computed, and with the privilege of selecting the basis most favorable to it. To make the plan work, it is necessary to confine the determination of tax liability to one return, and only one. The selection of the first, an intermediate, or the last return is a matter within the legislative discretion. In the act under consideration, the first return was selected."
>
> "The Board of Tax Appeals having held that the declaration contained in the first return was the true basis for the computation of the tax, and that the deficiency assessed by respondent was correct, its decision is affirmed."

There is therefore a recognized, direct conflict on the construction of a federal statute, which has not, but should be, passed upon and settled by the Honorable Court, by

granting the writ of certiorari, and thereafter reviewing and reversing the decision of the Honorable Circuit Court of Appeals.

Respectfully submitted,

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O. D. BRUNDIDGE,
Of Counsel.

APPENDIX.

SEC. 215(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

SEC. 215(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profts, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. * * *

SEC. 216(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 214, an excess-profits tax eqhivalent to 5 per centum of such portion of its net income

for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capita stock. * * * as of the close of the preceding income-ta taxable year (or as of the date of organization if it had n preceding income-tax taxable year) determined as pro vided in section 215. The terms used in this section shal have the same meaning as when used in the Revenue Ac of 1932.